

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Guenter Marksteiner)	
)	
v.)	CSR-7729-M
)	
Comcast Corporation, and Comcast Cable of)	
Florida/Georgia LLC)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: May 27, 2008

Released: May 27, 2008

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. On January 15, 2007, Guenter Marksteiner (“Marksteiner”), operator of television station WHDT-DT, Stuart, Florida (“WHDT,” pre-transition digital channel 59, post-transition digital channel 44), initiated a mandatory carriage proceeding by filing a Complaint.¹ WHDT alleges that it was improperly removed on October 11, 2007 from Comcast’s cable systems serving the West Palm Beach-Ft. Pierce, Florida Designated Market Area (“DMA”). WHDT asks that the Commission order Comcast to reinstate WHDT’s carriage and impose a forfeiture on Comcast for violations of the mandatory carriage (“must-carry”) rules, signal deletion notice rules, and customer service provisions found in Section 614 of the Communications Act, as amended (the “Act”),² and Sections 76.7, 76.61(a), 76.56(b), 76.1601, and 76.1603 of the Commission’s rules.³ To clarify certain matters concerning WHDT’s operating history, the Commission sent WHDT a Letter of Inquiry (“LOI”) on March 18, 2008. After considering WHDT’s response to the LOI, we order Comcast to reinstate carriage of WHDT conditioned upon WHDT’s proof of its authorized operations. We decline to impose the requested forfeiture on Comcast. In addition, we will refer matters pertaining to WHDT’s operational history to the appropriate Commission body for further investigation.

¹ Complaint and Request for Expedited Consideration of WHDT, filed Jan. 15, 2007 (“WHDT Complaint”). All references throughout to “WHDT” refer to complainant Marksteiner, WHDT-DT, and WHDT-LD/LP, unless otherwise specified. All references to “Comcast” are to Comcast Cable Communications, LLC and its subsidiary, Comcast Cable of Florida/Georgia LLC.

WHDT also filed an Emergency Petition with its Complaint seeking reinstatement of WHDT on Comcast’s cable systems and establishment of an expedited pleading cycle for adjudication of WHDT’s Complaint. *See* Emergency Petition for Declaratory Ruling and Enforcement Order, or in the Alternative, for Immediate Injunctive Relief by WHDT, filed Jan. 15, 2007 (“WHDT Emergency Petition”). In view of our disposition of the instant matter, we deem this Emergency Petition to be moot. In addition, we deny or deem moot the several additional pleadings, oppositions, and replies the parties have filed outside of the pleading cycle on various issues.

² 47 U.S.C. § 534.

³ WHDT Complaint at 1 (citing 47 CFR §§ 76.7, 76.61(a), 76.56(b), 76.1601, and 76.1603).

II. BACKGROUND

2. Under Section 614 of the Act and the implementing rules adopted by the Commission in the *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues* (“*Must Carry Order*”), commercial television broadcast stations such as WHDT-DT are entitled to assert mandatory carriage rights on cable systems located within the station’s market.⁴ A station’s market for this purpose is its “designated market area,” or DMA, as defined by Nielsen Media Research.⁵ The term DMA is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. The parties have not disputed that Comcast’s cable systems lie within WHDT’s market and that the station has must carry rights it can enforce on these cable systems subject to the station providing a good quality signal to Comcast’s principal headend.⁶

3. Pursuant to the Commission’s must carry rules, cable operators have the burden of showing that a commercial station that is located in the same DMA is not entitled to carriage.⁷ One method of doing so is for a cable operator to establish that a television signal, which would otherwise be entitled to carriage, does not provide a good quality signal to a cable system’s principal headend.⁸ WHDT asserts it was deleted by Comcast on October 11, 2007 from Comcast’s cable systems serving the West Palm Beach-Ft. Pierce, Florida DMA and thereby deprived of its mandatory carriage on those cable systems. Comcast asserts that it never deleted WHDT, but rather stopped carrying the station when it went off the air of its own accord.

A. WHDT Operating History

4. On April 25, 2000, WHDT was granted a permit to construct and operate a digital-only television station in Stuart, Florida.⁹ WHDT was subsequently granted special temporary authority (“STA”) in 2002 to operate a temporary facility in West Palm Beach (the “West Palm Beach” facility or site).¹⁰ Pursuant to this STA, WHDT commenced broadcasting from the West Palm Beach site in late August 2002, but allowed the authority for such operation to expire on September 6, 2003.¹¹ Therefore, WHDT has had no authority to transmit an over-the-air signal from the West Palm Beach site after

⁴ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, MM Docket No. 92-259, Report and Order, 8 FCC Rcd 2965, 2975-77, ¶¶ 41-46 (1993) (“*Must Carry Order*”).

⁵ Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station’s market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. *See* 47 U.S.C. § 534(h)(1)(C). Section 76.55(e)(2) of the Commission’s rules specifies that a commercial broadcast television station’s market is its Designated Market Area as determined by Nielsen Media Research. 47 C.F.R. § 76.55(e)(2).

⁶ Comcast’s principal headend is located in Palm Beach County, southwest of West Palm Beach, Florida, at 9689 Palomino Road, Lake Worth, Florida, near State Route 7. Opposition to Complaint by Comcast, filed Feb. 19, 2007, Rhodes Declaration at 1, 2 (“Comcast Opposition”). *See also* 47 U.S.C. 534(h)(1)(B)(iii); 47 C.F.R. § 76.55(c)(3); and *Must Carry Order*, 8 FCC Rcd at 2991, ¶ 104.

⁷ *See Must Carry Order*, 8 FCC Rcd at 2990, ¶ 102.

⁸ *See* 47 C.F.R. § 76.55(c)(3).

⁹ FCC File No. BPCDT-19960920LH – Granted: 04/25/2000 (coordinates: N: 26 degrees 43 Minutes 37 Seconds, W: 80 degrees 04 minutes 48 seconds). We note that the original construction permit for WHDT has been extended, and the station is required to complete construction by February 17, 2009.

¹⁰ FCC File No. BDSTA-20020814ABN – Granted: 08/23/2002; Expired: 02/23/2003 (coordinates: N: 26 degrees 43 Minutes 37 Seconds, W: 80 degrees 04 minutes 48 seconds).

¹¹ FCC File No. BEDSTA-20030221ACH – Granted: 03/06/2003; Expired: 09/06/2003.

September 2003.¹²

5. In 2002, WHDT was also granted an STA (the “Stuart STA”) to operate a temporary facility from a site in an industrial park in Stuart, Florida (the “Stuart Industrial Park” facility or site).¹³ WHDT has obtained several extensions of the Stuart STA, the most recent of which expired on January 11, 2008.¹⁴ WHDT has a pending request on file to extend this authority.¹⁵ Though WHDT has maintained that this facility has remained the source of its authorized, over-the-air digital broadcasting, WHDT has made clear in response to the Commission’s LOI that WHDT does not now, and has never, transmitted its over-the-air signal to Comcast’s principal headend in Palm Beach from its Stuart Industrial Park facility.¹⁶ WHDT asserts that because its authorized tower at its Stuart Industrial Park site is too distant to transmit to Comcast’s principal headend,¹⁷ it has used alternative means to transmit its signal to Comcast’s headend.¹⁸ Despite the Commission’s LOI specifically asking WHDT how it provided its signal to Comcast’s principal headend in Palm Beach, it remains unclear how WHDT has provided this signal since the STA for its West Palm Beach facility expired in September 2003. It appears, however, that WHDT was operating its West Palm Beach facility up until September 14, 2007, when the Commission field office ordered WHDT to stop transmitting from that facility because its STA had expired. Comcast asserts that after September 14, 2007, WHDT went off the air for several days.¹⁹

6. In support of the contention that WHDT operated from its West Palm Beach facility for nearly four years without authority, Comcast asserts that WHDT’s receiving antenna on Comcast’s principal headend was pointed at WHDT’s West Palm Beach facility and Comcast had received WHDT’s

¹² Nevertheless, WHDT continues to maintain a studio and a master control room at this West Palm Beach site. Response of WHDT to Mar. 18, 2008 Letter of Inquiry, filed Apr. 1, 2008, at 6, 7 (“Response to LOI”).

¹³ FCC File No. BDSTA-20020419ACA – Granted: 05/01/2002; Expiration: 11/01/2002 (coordinates: N: 27 degrees 09 Minutes 08 Seconds, W: 80 degrees 12 minutes 53 seconds).

¹⁴ FCC File Nos. BEDSTA-20021029ABK – Granted: 10/31/2002; Expired: 05/01/2003; BEDSTA-20030429ABY – Granted: 05/16/2003; Expired: 11/16/2003; FCC File No. BEDSTA-20031114AKC – Granted: 07/11/2007; Expired: 01/11/2008.

¹⁵ CC File No. BEDSTA-20080102ACL - Accepted: 01/07/2008; Decision Pending.

¹⁶ Response to LOI at 5.

¹⁷ Contingent Reply to Opposition by WHDT, filed Feb. 28, 2007, at 7 (“WHDT Contingent Reply”).

¹⁸ *Id.* See also Comcast Opposition, Rhodes Declaration at 2, 3. WHDT states that “Comcast receives [WHDT’s] good quality analog signal from equipment which is owned by [WHDT], ... which [WHDT] has installed at its own expense at Comcast’s headend,” and which “has the ability to capture a multiplicity of input sources including optical fiber, digital BAS and digital ATSC transmissions.” Response to LOI at 5. It maintains that in 2006, it deployed a temporary non-broadcast (1W) short-haul BAS radio link between its master control room in West Palm Beach, Florida and its receiving equipment at Comcast’s principal headend to use when interference prevented direct reception from the Stuart Industrial Park site. Response to LOI at 6. WHDT states it discontinued this link and removed this equipment on September 12, 2007, after completing the maximum 720 hours per year of allowed operation for such equipment. Response to LOI at 6, 8; see also WHDT Contingent Reply at Ex. B, Response of Guenter Marksteiner to “Comments on Request for Special Temporary Authority,” filed Dec. 12, 2007, at Attachment B, Marksteiner December 12 Declaration at n.2.

¹⁹ Comcast Opposition at 6, Rhodes Declaration at 3. Comcast points to an article dated September 19, 2007, in “TCPalm: Florida’s Treasure Coast and Palm Beaches,” titled “WHDT has been off air since Friday to prepare for analog-to-digital switch,” in which WHDT officials were quoted as saying that the station was “undergoing changes to prepare for television’s analog-to-digital switch in early 2009,” and that “[a] linkage from [the] studio to the transmitter” caused the break in service. *Id.* at Ex. 5. Given that the Friday mentioned in the article would have been September 14, 2007, WHDT would have been off the air for at least five days by the date of the article.

signal from that location since late 2004.²⁰

7. After the Commission's field office ordered WHDT to stop transmitting, Comcast states that on September 17, 2007, WHDT reoriented the WHDT receiving antenna on Comcast's principal headend toward the south and away from West Palm Beach.²¹ It also states that on September 18, 2007, WHDT reset the antenna to receive input from WHDT's low power station in Miami, WHDT-LP (channel 44).²² WHDT asserts that WHDT-DT and WHDT-LP transmit identical audio/video programming feeds which originate from WHDT's main studio in West Palm Beach, the site of WHDT's full-power authorization.²³

8. WHDT asserts that its Stuart Industrial Park facility went off the air on October 16, 2007 due to a local utility power reduction.²⁴ The records of WHDT-DT's broadcast history provided in response to the Commission's LOI reveal that from approximately noon on September 26, 2007 through October 23, 2007 (27.5 days), WHDT's Stuart Industrial Park facility was off-air for approximately 627.5 hours (or approximately 26 days), and on-air approximately 32.5 hours, or only a little less than a day and a half.²⁵

9. To remedy its service disruption at its Stuart Industrial Park facility, on October 19, 2007, WHDT sought an emergency STA to transmit from an alternative location in Palm City, Florida, approximately 1.8 miles from WHDT's previous Stuart Industrial Park site.²⁶ The Commission granted WHDT emergency authority to operate from Palm City on October 23, 2007.²⁷ WHDT operated at this

²⁰ Comcast Opposition at 9, Rhodes Declaration at 2, 3, and 4.

²¹ Comcast Opposition, Rhodes Declaration at 3.

²² *Id.* The operational logs of WHDT-LP show that it has continued transmitting with some interruptions from September 21, 2007 through March 18, 2008, the date of the Commission's LOI. Response to LOI at Ex. 7. The record shows that on January 13 and 14 WHDT-LP was off air for approximately 9 and 10.5 hours, respectively; that it was transmitting 24 hours a day from January 15 through January 21; that on January 22 it was off air for approximately 12 hours; that from January 23 to January 26 it was off air for 96 hours (24 hours per day); that on January 27 it was off air for 22 hours; and, that from February 1 until March 18 it was transmitting 24 hours a day with one approximate 6 hour exception off air on March 8. *Id.*

²³ Response to LOI at 7.

²⁴ FCC File No. BDSTA-20071019BAB (site coordinates: N: 27 degrees 08 Minutes 17.5 Seconds, W: 80 degrees 16 minutes 21.2 seconds).

²⁵ Response to LOI at 3-4 and Ex. 1. In particular, from noon of September 26 through September 30 WHDT's Stuart Industrial Park facility appears to have been off air for 105 out of a total of 108 hours (on air 3 hours); on October 1 it was off air for 20.5 hours (on air 3.5 hours); from October 2 through October 9 it was off air for 189 hours (on air 3 hours) out of a total of 192 hours; on October 10 it was off air for a full 24 hours; from October 11 through October 15 it was off air for 100 hours (on air 20 hours) out of a total of 120 hours (it was on air approximately 4 hours a day during this time); on October 16 it was off air for 21 hours (on air 3 hours); and from October 17 through October 23, it was off air for a full 168 hours (no on air time). *Id.* Starting from October 24 until February 10, WHDT asserts it began operating out of its Palm City Location, having received emergency temporary authority to do so from the Commission on October 23. Response to LOI at 2.

²⁶ See Comcast Opposition at 7, Rhodes Declaration at 4-5; see also FCC File No. BDSTA-20071019BAB.

²⁷ WHDT Contingent Reply at Ex. B, Response of Guenter Marksteiner to "Comments on Request for Special Temporary Authority," filed Dec. 12, 2007, at Attachment C, e-mail authorization of October 23, 2007, from Nai Tam to Paul Feldman. The operational history of WHDT's Palm City transmitter shows that prior to October 24, 2007 it was off air; that on October 24, it was off air for 18 hours (on air for 6 hours); that from October 25 until November 21 it was off air 16 hours per day (on air for 8 hours per day); that on November 22 it was off air 24 hours; that from November 23 until January 31, 2008 it was off air 16 hours per day (on air for 8 hours) with the exception of December 25 when it was off air 24 hours; that on February 1 it was off air for almost 22 hours; and,

(continued....)

Palm City location until February 10, and on February 15, 2008, WHDT sought to withdraw the emergency STA for Palm City because it had resumed broadcasting from the Stuart Industrial Park site on February 12, 2008.²⁸

10. To summarize the prior history of operations in brief, WHDT was ordered by the Commission field office to stop transmitting from its West Palm Beach facility on September 14, 2007, and also stopped transmitting completely from its Stuart Industrial Park facility on October 16, 2007. Additionally, WHDT's response to the Commission's LOI indicates that the Stuart Industrial Park facility had been experiencing outages even prior to October 16, 2007. It had been off the air for almost 19 days and only on the air for approximately two days from September 26 until October 16, 2007.²⁹

B. The Must Carry Dispute

11. According to WHDT, the basis for its complaint arose when on October 11, 2007, Comcast deleted WHDT's signal from carriage on its cable systems in the West Palm Beach-Ft. Pierce, Florida DMA in contravention of the Commission's carriage rules. On October 11, Comcast also began airing a message lasting for seven weeks on the channel position previously occupied by WHDT, stating that "WHDT-UHF-59 IS NOT TRANSMITTING AT THIS TIME."³⁰ As discussed above, from September 26 through October 11, WHDT's Stuart Industrial Park facility had been off the air for almost 15 days and only on the air for approximately 26 hours.³¹

12. In a letter dated October 12, 2007, Comcast informed WHDT that its system was no longer retransmitting WHDT because of the station's failure to deliver its signal to Comcast's headend in Palm Beach,³² and asked WHDT to notify Comcast when it had resumed transmitting an over-the-air full-power signal and could provide a good quality signal.³³

13. On December 20, 2007, WHDT demanded by letter that Comcast reinstate cable carriage of WHDT.³⁴ WHDT argued it was broadcasting over the air on Channel 59 in October 2007, was continuing broadcasting as of December 20th, and had been delivering a good quality signal to Comcast's headend.³⁵ WHDT apparently contends that it was transmitting over the air from its emergency Palm City facility, which was authorized after WHDT's Stuart Industrial Park facility went off the air, and from its low power station WHDT-LP. Additionally, WHDT appears to maintain that it provided its signal to Comcast's headend from its low power station in Miami.

14. Comcast replied by letter on December 26, 2007 that it intended to comply with its must carry obligations with respect to WHDT when WHDT qualified for such carriage and when Comcast was

(...continued from previous page)

that from February 2 until February 10 it was again off air for 16 hours per day (on air for 8 hours). After February 10, 2008, WHDT was completely off the air in Palm City. Response to LOI at Ex. 2.

²⁸ Response to LOI at Exs 1 and 2; *see also* Comcast Opposition at Ex. 1 (Letter from Lauren Lynch Flick on behalf of Guenter Marksteiner to Marlene H. Dortch, Secretary, FCC (Feb. 15, 2008)).

²⁹ Response to LOI at Ex. 1.

³⁰ WHDT Complaint at 3 and Ex. A.

³¹ Response to LOI at Ex. 1.

³² WHDT Complaint at Ex. C.

³³ *Id.*

³⁴ *Id.* at Ex. D.

³⁵ *Id.*

able to verify that WHDT's operation was authorized by the Commission.³⁶ Comcast argued that when WHDT ceased broadcasting as a full power station from its authorized location in the market, it was no longer entitled to mandatory carriage and Comcast therefore dropped carriage of WHDT-LP.³⁷

III. DISCUSSION

15. The parties do not dispute that WHDT has must carry rights on Comcast's cable systems subject to WHDT providing a good quality signal. WHDT argues that Comcast deleted WHDT from its channel lineup on October 11, 2007 without providing the requisite 30 days' advance notice.³⁸ In this regard, WHDT asserts that Comcast failed to give notice to the station and its viewers pursuant to Section 1601, and to subscribers pursuant to Section 1603 of the Commission's rules.³⁹ Second, WHDT argues that Comcast, prior to removing its signal, failed to provide certain signal measurement information to WHDT as required by Section 76.61(a)(2).⁴⁰ WHDT argues that because it provided a good quality signal to Comcast's principal headend via WHDT-LP, its FCC-authorized low power station, Comcast's ability to receive WHDT's over-the-air signal is irrelevant.⁴¹

16. In its Opposition, Comcast responds that it intends to carry WHDT and to comply with its must carry obligations when the Commission confirms that WHDT's current operations are authorized.⁴² Comcast argues that it never took action to forcibly remove WHDT's signal from its cable systems, but rather stopped carrying the station after it ceased broadcasting on September 14, 2007.⁴³ Comcast further argues that up until WHDT stopped transmitting on September 14th, WHDT had not been transmitting lawfully, as it had let its West Palm Beach STA lapse and continued to transmit from that location.⁴⁴ Comcast argues that WHDT was no longer transmitting from any authorized full-power location after September 14, 2007, as it was not broadcasting from West Palm Beach or Stuart, Florida.⁴⁵ It further asserts it has no obligation to carry a station that is not broadcasting or that is broadcasting unlawfully.⁴⁶ Furthermore, Comcast argues it has no obligation to carry WHDT's signal from WHDT-LP, Channel 44, Miami, Florida, because that station has no must-carry rights.⁴⁷ Finally, Comcast argues WHDT does not

³⁶ WHDT Complaint at Ex. E.

³⁷ *Id.*

³⁸ *Id.* at 5.

³⁹ *Id.* at 10.

⁴⁰ *Id.* at 5-6.

⁴¹ *Id.* at 6. WHDT argues the Commission has ruled that delivery of a good quality signal via translator is acceptable. *Id.* at 6-7 (citing *Must Carry Order*, 8 FCC Rcd at 2991).

⁴² Comcast Opposition at 2. Comcast argues that it has sought only two things from WHDT – a definitive statement as to the location of the WHDT transmitter and confirmation that the operation is authorized. Comcast Opposition to WHDT Emergency Petition at 2.

⁴³ *Id.* at iii and 2.

⁴⁴ *Id.* at 9. Comcast alleges that WHDT could not have been broadcasting from the Stuart Industrial Park site on October 11, 2007, because photographs show the Stuart antenna was "lying on the ground" on that date. *Id.* at 10 and Ex. 7. WHDT responds that the monopole lying on the ground at the Stuart Industrial Park was intended as a component to a cellular tower application for which WHDT-DT was a co-applicant, and that WHDT's actual STA broadcast operations utilize a second dedicated factory top tower at the same site. WHDT Contingent Reply at 6, Ex. B (Response of Guenter Marksteiner to "Comments on Request for Special Temporary Authority," filed Dec. 12, 2007, at Attachment B, Marksteiner December 12 Declaration at 1-2), and Ex. C.

⁴⁵ *Id.* at 6.

⁴⁶ *Id.* at 8.

⁴⁷ *Id.* at 2.

qualify as a station that is “broadcasting” because it is not viewable by the public.⁴⁸

17. Under our must carry rules, cable operators have the burden of showing that a broadcasting station otherwise entitled to carriage does not provide a good quality signal to its cable system's principal headend. The Commission has previously found that a bare claim of poor signal quality by a cable operator without the requisite engineering data cannot be relied upon to support a refusal of carriage.⁴⁹ Furthermore, a cable operator's burden of showing the inadequacy of a station's signal is not satisfied by studies conducted while the station is not operating at full power or is not broadcasting.⁵⁰ The Commission has previously characterized such studies as “useless” because they do not provide information that will assist broadcasters to determine whether they wish to pay for appropriate signal improvements.⁵¹ Such studies also do not represent full cooperation by cable operators in supplying broadcasters with relevant data, as contemplated by the Commission in connection with the resolution of disputes regarding the adequacy of signal levels delivered to cable system headends.⁵² However, stations, such as WHDT, bear responsibility for informing cable operators when a station will be off the air or operating at reduced power when a carriage complaint has been initiated.⁵³

18. Accordingly, Comcast should have provided signal-strength studies to WHDT when it stopped carrying WHDT on the basis that the station had failed to provide a good quality signal to its principal headend. However, WHDT, for its part, should have informed Comcast when it went off the air or operated outside its normal operating parameters. Neither party fulfilled its obligations in this respect.

19. Furthermore, WHDT also had an obligation to notify the Commission that it was experiencing technical difficulties that were preventing it from meeting its minimum operating schedule requirements. Section 73.1740 of the Commission's rules requires that after 36 months of operation, stations must operate not less than two hours each day and 28 hours a week.⁵⁴ Furthermore, if causes beyond the control of the licensee make it impossible to adhere to this operating schedule, the station may limit or discontinue operation for a period not more than 30 days without further authority from the Commission, but it must send notification to the Commission no later than the 10th day of this limited or discontinued operation.⁵⁵ From approximately noon on September 26, 2007 through October 23, 2007 (27.5 days), WHDT-DT was off-air for approximately 627.5 hours, and on-air approximately 32.5

⁴⁸ *Id.* at 5 (citing 47 USC § 153(6); *In the Matter of Subscription Video*, Gen. Docket No. 85-305, Report and Order, 3 FCC Rcd 1001, 1004, ¶ 27 (1987), *aff'd sub nom. Nat'l Ass'n for Better Broad. v. FCC*, 849 F.2d 665 (D.C. Cir. 1998)). Comcast claims it has learned that WHDT's signal cannot be received on a standard digital receiver or QAM (quadrature amplitude modulation) tuner, which has led Comcast to believe that WHDT was operating in a proprietary format that could not be received over-the-air with a normal, store bought digital TV receiver. *Id.* WHDT replies that its signal is freely available over-the-air in compliance with the Commission's rules, that WHDT has been transmitting in the standard ATSC implementation of 8-level Vestigial Sideband Modulation (8VSB), and that WHDT has been so transmitting for five years, excepting normal interruptions for maintenance. WHDT Contingent Reply at 5 and n.8

⁴⁹ See *Rancho Palos Verdes Broadcasters, Inc.*, 18 FCC Rcd 7068, 7071, ¶ 7 (2003).

⁵⁰ *Christian Television Network v. Galaxy Cable, Inc.*, 18 FCC Rcd 15190, 15192, ¶ 6 (2003), *as corrected* 18 FCC Rcd 16449 (2003); see also *R y F Broadcasting, Inc. v. Cable TV of Greater San Juan*, 14 FCC Rcd 6821, 6823, ¶ 7 (1999).

⁵¹ *Id.* at 15192, ¶ 6, n.25 (citing *Must Carry Order*, 8 FCC Rcd at 2991).

⁵² *Id.* at 15192, ¶ 6.

⁵³ *Id.*

⁵⁴ See 47 C.F.R. § 73.1740(a)(2)(ii).

⁵⁵ See 47 C.F.R. § 73.1740(a)(4).

hours.⁵⁶ Within this time frame, WHDT often did not operate two hours a day, and sometimes did not operate 28 hours a week.⁵⁷ The record does not reflect that WHDT notified the Commission when it was off-air for these periods.

20. Finally, WHDT has admitted that the signal sent from its full-power station's transmitter located at its Stuart Industrial Park facility is too weak to reach Comcast's principal headend located in West Palm Beach, Florida, and that it has never used over-the-air methods to transmit its signal to Comcast's principal headend, but rather has utilized alternate means of delivery. A full-power station such as WHDT may use alternative delivery methods such as the simulcasting of its signal by a low power station to the cable system's principal headend.⁵⁸ WHDT could deliver its signal to Comcast's principal headend through use of its low power transmitter, WHDT-LP, assuming that WHDT's full-power station was broadcasting during the same time periods when this method was being utilized. Although WHDT-LP may have been broadcasting mostly without interruption from September 21, 2007 through January 12, 2008,⁵⁹ the full-power station whose signal it apparently simulcast, WHDT-DT, Stuart, Florida, had been off-air for approximately 26 days from September 26 until October 23.⁶⁰ Therefore, WHDT appears not to have been broadcasting from its full-power facility during much of the time it was allegedly providing its signal to Comcast's principal headend via its low power station. A station cannot rely on the use of a low power station to simulcast and place a good quality signal on the cable system headend when its authorized full-power facility is not operating. In the future, if WHDT can continue to transmit a full-power, over-the-air digital signal from its authorized location, it may choose to use its low power station to simulcast its signal to Comcast's principal headend.

21. In view of WHDT's admitted intermittent full power service and its failure to communicate with Comcast about its outages, we believe that Comcast's efforts to provide notice of WHDT's status to its subscribers and its failure to provide signal strength studies to WHDT are not unreasonable under the circumstances. Accordingly, we do not believe that forfeiture is warranted in this matter.

IV. CONCLUSION

22. We find that WHDT has verified under oath that it is currently transmitting its full-power, over-the-air digital signal from its Stuart, Florida location and that its transmission from its low power facility, WHDT-LP, Miami, Florida, is a simulcast of WHDT-DT's signal. This signal from WHDT-LP therefore can be utilized as an alternative means for WHDT to transmit its signal to Comcast's principal headend. Based on the foregoing, we find that WHDT is entitled to mandatory carriage on Comcast's cable system serving the West Palm Beach-Ft. Pierce, Florida DMA, and order that Comcast reinstate carriage of WHDT, but condition our reinstatement order upon WHDT delivering a good quality signal to Comcast's principal headend.

23. Therefore, we require that WHDT provide Comcast and the Commission within five days of the date of this order an affirmation verified under oath stating that (i) WHDT continues to transmit its full-power, over-the-air digital signal from its Stuart, Florida location; (ii) the transmission of WHDT-LP, Miami, Florida is a simulcast of WHDT-DT's signal; and, (iii) the street address and coordinates of the location from which WHDT intends to transmit a signal meeting the Commission's signal strength criteria to Comcast's principal headend. Within 10 days of the receipt of this information, Comcast must

⁵⁶ See *supra* n.25.

⁵⁷ *Id.*

⁵⁸ See *Must Carry Order*, 8 FCC Rcd at 2973, ¶ 30.

⁵⁹ Response to LOI at Ex. 7

⁶⁰ *Id.* at Ex. 1.

conduct a signal quality test to determine whether WHDT's signal meets the Commission's signal strength-criteria, and Comcast shall provide the results of these studies to both WHDT and the Commission within 10 days of this test. If WHDT is delivering a good quality signal to Comcast's principal headend, even if by alternative means, Comcast must reinstate the station on its cable systems serving the West Palm Beach-Ft. Pierce, Florida DMA within 10 days of conducting the signal quality test.⁶¹ Alternatively, if Comcast determines that WHDT is not delivering a good quality signal to Comcast's principal headend, Comcast must inform WHDT and the Commission of that fact, supported with a copy of its signal quality test, within 10 days of conducting its test.

24. Finally, due to concerns that have been raised with respect to WHDT's prior and ongoing operations, we will provide the instant case file to the appropriate investigative authority within the Commission for further investigation. In this regard we note that WHDT had no authority to transmit a full-power over-the-air signal to Comcast's principal headend from its West Palm Beach studio facilities once its authority to do so lapsed in 2003. Since that time, the Commission field office has already had occasion to order WHDT to stop transmitting from that facility. However, WHDT has failed to clarify what other means it has used to transmit its signal to Comcast's principal headend, particularly as WHDT has admitted that its Stuart Industrial Park facility is too far to transmit to Comcast's principal headend. Such inconsistencies in the record, in addition to WHDT's failure to meet minimum operating requirements without informing the Commission, raise questions and concerns about WHDT's ability to maintain stable operations in accordance with the Commission's rules.

V. ORDERING CLAUSES

25. Accordingly, **IT IS ORDERED**, that within five days of the date of this order, WHDT-DT must provide a further affirmation verified under oath that: (i) WHDT-DT continues to transmit its full-power, over-the-air digital signal from its Stuart, Florida location; (ii) the transmission of WHDT-LP, Miami, Florida is a simulcast of WHDT-DT's signal; and, (iii) the street address and coordinates of the location from which WHDT-DT intends to transmit a signal meeting the Commission's signal strength criteria to Comcast's principal headend in the West Palm Beach-Ft. Pierce, Florida DMA;

26. **IT IS FURTHER ORDERED** that within 10 days of receipt of WHDT's transmitter location, Comcast must conduct a signal quality test of WHDT's signal at Comcast's principal headend and must determine whether WHDT is providing a good quality signal for purposes of carriage;

27. **IT IS FURTHER ORDERED** that Comcast must serve a copy of its signal quality test upon both WHDT and the Commission within 10 days of the test and must inform the Commission if WHDT is not providing a good quality signal to Comcast's principal headend; and,

28. **IT IS FURTHER ORDERED** that in accordance with Section 76.61(a)(4) of the Commission's rules, 47 C.F.R. § 76.61(a)(4), if WHDT-DT provides a good quality signal to Comcast's principal headend, Comcast **SHALL COMMENCE CARRIAGE** of WHDT-DT's signal on its cable systems serving the West Palm Beach-Ft. Pierce, Florida DMA within 10 days from the date that Comcast completes its signal quality test, and WHDT-DT shall be carried on the channel of the cable system as specified by Section 76.57 of the Commission's rules.

29. This action is taken under authority delegated by Section 0.283 of the Commission's rules, 47 C.F.R. § 0.283.

⁶¹ Note that we waive the advance notice provisions contained in 47 C.F.R. §§ 1601 and 1603 as applicable to this shortened reinstatement period, but we instruct Comcast to provide as much prior notice as possible to the station, subscribers, and franchising authorities consistent with the terms of this order.

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Senior Deputy Chief, Policy Division
Media Bureau